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## State v. Strange Respondent's Brief Dckt. 35032

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

CALVIN CHAMP STRANGE,

Defendant-Appellant.

NO. 35032 & 35061

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF WASHINGTON

HONORABLE STEPHEN W. DRESCHER  
District Judge

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

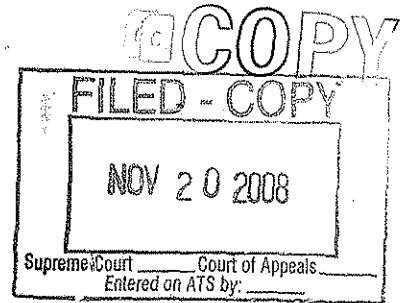
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## STATEMENT OF THE CASE

### Nature of the Case

Calvin Champ Strange is appealing from the order of the district court denying his motion for a new trial on the ground of juror misconduct.

### Statement of Facts and Course of Proceedings

The State charged Strange with possession of a controlled substance, felon in possession of a firearm, and misdemeanor possession of drug paraphernalia. (R., pp. 7, 36-37.) The charge of felon in possession of a firearm was dismissed before trial. (R. pp. 50-51, 54-55.)

In August, 2007, the case went to trial (R., pp. 58-72) on the remaining two charges and Strange was convicted on both (R., p. 71-73). Two months after the trial was over, in October, 2007, the district court received a letter from one of the jurors. (R., pp. 80-81.) Juror Wendy Muir reported "two things that were worrisome for me as a juror." (R., p. 80.) The first issue raised questioned why a silver cigarette case had not been fingerprinted and the results reported to the jury. The second concern Muir had was whether the jury could hear during the trial proceedings. Muir stated that the juror sitting next to her could not hear, but he, at some point, was provided with an assistive listening device. (R., pp. 80-81.) She further stated that she "had difficulty in hearing all that was being said and others serving on the jury indicated the same thing." (R., p. 80.)

The district court provided copies of the letter to counsel and, in response, Strange made a motion to set aside the verdict and for a new trial. (R., pp. 78-79.) A hearing was held on Strange's motions to vacate sentencing, for a new

trial, and to release juror information. (R., pp. 90-91.) At the conclusion of the hearing, the district court granted Strange leave to subpoena the jurors. (R., p. 91; Tr., p. 129, Ls. 5-18.)

Eleven of the twelve jurors gave testimony about their trial experiences. (R. pp. 95-96, Tr. p.132, L. 3 - p. 139, L. 3.) The district court presented findings and conclusions as to the validity of the jurors' finding Strange guilty beyond a reasonable doubt, and denied the motion for a new trial. (R., pp. 96-98.)

On the possession charge, Strange was sentenced to a unified sentence of five years, with one-and-a-half years fixed. (R., pp. 99-101, 109-111.) On the paraphernalia charge, Strange was sentenced to 30 days in the Washington County Jail, to run concurrent. (R., p. 110.) Strange filed a timely notice of appeal. (R., pp. 112-114.)

## ISSUES

Strange presents the following issues on appeal:

1. Whether the Court erred in not setting aside the Defendant's conviction because the jury's decision was tainted by the manner in which the jury was able to receive and hear the evidence.
2. Whether the evidence presented and the manner in which it was presented could sustain the Defendant's conviction on the charge.

(Appellant's brief, p. 2.)

The state rephrases the issues on appeal as:

Has Strange failed to carry his burden of establishing that the district court erred in denying his motion for a new trial on the basis of juror misconduct?



## ARGUMENT

### Strange Failed To Carry The Burden Of Establishing That The District Court Erred In Denying His Motion For A New Trial On The Basis Of Juror Misconduct

#### A. Introduction

The district court made the determination that there was not enough evidence to show that the jurors could not hear large portions of trial testimony, according to the jurors' testimony at the hearing. Although there apparently were times when one or more jurors found it "difficult to hear" (Tr., p. 133, Ls. 5-17), the district court determined, according to the jurors' post-trial testimony, that they were able to understand or decipher enough that the validity of the verdict could not be called into question (Tr., p. 141, Ls. 14-21).

Strange asserts that the district court erred in finding that he is not entitled to a new trial on the ground that no juror misconduct occurred when it was discovered that some jurors allegedly could not hear all of the court proceedings. (Appellant's brief, pp. 3-5.) Strange argues that, "[c]learly any time jurors are unable to understand or decipher statements by all parties involved in a criminal trial calls into question the validity of the verdict." (Appellant's brief, p. 4.)

The State submits that Strange has failed to show error in the denial of his motion for a new trial. Specifically, he has failed to show that the factual findings made by the district court were clearly erroneous.

#### B. Standard of Review

When reviewing a trial court's ruling on a motion for new trial, the appellate court applies an abuse of discretion standard. State v. Cantu, 129 Idaho 673, 674, 931 P.2d 1191, 1192 (1997). A trial court has wide discretion to

grant or refuse to grant a new trial, and the appellate court will not disturb that exercise of discretion, absent a showing of manifest abuse. Id., citing State v. Olin, 103 Idaho 391, 648 P.2d 203 (1982). Factual findings of the district court will not be disturbed if supported by substantial evidence. See State v. Stefani, 142 Idaho 698, 704, 132 P.3d 455, 461 (Ct. App. 2005).

C. The District Court's Decision Denying Strange's Motion For A New Trial On The Basis Of Juror Misconduct Was Not An Abuse Of Discretion

A motion for a new trial may be granted only upon the grounds set forth in I.C. § 19-2406. State v. Cantu, 129 Idaho 673, 675, 931 P.2d 1191, 1193 (1997). Those grounds include jury "misconduct by which a fair and due consideration of the case has been prevented." I.C. § 19-2406(3). In Idaho, there is a two prong test for determining whether a defendant is entitled to a new trial due to juror misconduct. "First, the defendant must present *clear and convincing evidence* that juror misconduct has occurred. Second, the trial court must be convinced that the misconduct *reasonably could have prejudiced the defendant.*" State v. Reutzel, 130 Idaho 88, 96, 936 P.2d 1330, 1338 (Ct. App. 1997) (emphasis added), citing State v. Seiber, 117 Idaho 637, 640, 791 P.2d 18, 21 (Ct. App. 1990).

Strange has failed to show that the inability of one or two jurors to hear everything that transpired in the courtroom due to poor acoustics is jury misconduct as contemplated by I.C. § 19-2406(3). Although no reported Idaho

case has so held,<sup>1</sup> other courts have recognized a form of juror misconduct under the category of "juror inattentiveness." Examples of this are when jurors are found to be napping during the trial, simply not paying attention to the proceedings, or by other impairment, such as intoxication during the proceedings. See, e.g., Samad v. U.S., 812 A.2d 226 (D.C. 2002) (brief lapses in jurors' attention that are not prejudicial may be excused; prolonged inattentiveness, however, jeopardizes the defendant's Fifth and Sixth Amendment rights to a fair trial before a tribunal that is both impartial and mentally competent); People v. King, 121 P.3d 234 (Colo. Ct. App. 2005) (defendant was not entitled to have an apparently sleeping juror replaced with an alternate juror; although the trial court observed that the juror had his eyes closed on occasion, the court found that the evidence was insufficient to support the conclusion that he had actually been asleep or missed substantial portions of the evidence); Chubb v. State, 640 N.E.2d 44 (Ind. 1994) (affidavit of spectator that he observed juror asleep during portions of trial was insufficient to establish juror inattentiveness and to demonstrate prejudice, where the affidavit failed to specify identity or duration of specific portion of trial missed, juror's alleged inattentiveness had not contemporaneously brought to court's attention for

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<sup>1</sup> Cf., State v. Bolen, 143 Idaho 437, 440-41, 146 P.3d 703, 706-707 (Ct. App. 2006) ("if the defendant or his counsel know that a juror is sleeping or otherwise inattentive and the matter is not brought to the attention of the trial court, post-verdict relief will not be granted pursuant to a motion for a new trial"). The State notes that issues of jurors being able to hear were raised and addressed during or before trial, but Strange did not at that time move for a mistrial or claim that the district court's corrective measures were inadequate. (See, e.g., Tr., p. 135, L. 18 - p. 136, L. 20 (Juror Russell had trouble hearing until provided a hearing device.).)

determination of whether juror was actually sleeping, and juror's mere falling asleep for short time did not necessarily constitute sufficient cause for new trial in absence of convincing explanation as to how defendant was thereby deprived of his rights); and State v. Chesnut, 643 SW.2d 343 (Tenn. 1982) (court held that a motion for new trial based on the fact that two jurors fell asleep during the prosecution's case was properly denied, where the jurors at most missed five minutes of testimony over the course of a three-day trial, and where testimony concerning the same matters was elicited from other witnesses).

These cases involve jury misconduct because they involve affirmative action by jurors. A mere inability to hear everything is not misconduct by jurors, and therefore not grounds for a new trial motion. Strange has therefore failed to show error in the denial of his motion as a matter of law. Even if a mere inability to hear every word spoken in the courtroom could be considered "misconduct," Strange has shown no error. In this case, the trial court "went the extra mile" to investigate whether some jurors may not have been able to hear. (R., pp. 80-81). The trial court held a hearing, polled the jurors, and took testimony from each. (Tr., p. 131, L. 3 - p. 139, L. 3.) Although a few of the jurors admitted they occasionally had difficulty hearing a sentence or two here or there, there was no indication that many on the jury panel were deprived of being able to hear substantial portions of trial testimony. (R., pp. 96-97; Tr., p. 133, L. 5 - p. 138, L. 22.)

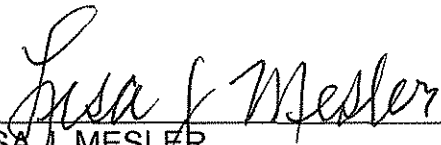
The district court found that the testimony of the jurors at the post-trial hearing established that there was no basis "to undermine the jury verdict nor to

determine that the jurors were unable to receive the evidence as presented," because the acoustics of the courtroom were "sufficient for hearing all testimony and instructions of the Court." (R., p. 96.) Strange has not demonstrated that he was prejudiced by the courtroom's acoustics. He has not shown that any juror missed evidence or instructions necessary to reach a fair verdict. As such, the district court's factual findings that there was no basis to conclude that the verdict was undermined or that the jury was unable to receive the evidence have not been shown to be in error. Likewise, Strange has failed to show an abuse of discretion in the district court's conclusion that he was not prejudiced.

#### CONCLUSION

The State respectfully requests that the order of the district court denying Strange's motion for a new trial on the ground of juror misconduct be affirmed.


DATED this 20th day of November 2008.

  
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LISA J. MESLER  
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20th day of November 2008, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

JOHN PRIOR  
Attorney at Law  
16 12<sup>th</sup> Avenue South, Ste 113  
Nampa, ID 83651

  
\_\_\_\_\_  
LISA J. MESLER  
Deputy Attorney General

LJM/pm

